

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|------------------------------------|---|--------------------|
| LANEL LOMACK |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 216,924 |
| SERVICE AMERICA CORPORATION |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| WAUSAU INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Claimant appealed the preliminary hearing Order Denying Compensation entered by Administrative Law Judge Bryce D. Benedict on December 2, 1996.

ISSUES

The single issue for Appeals Board review is the Administrative Law Judge's denial of claimant's request for preliminary compensation benefits because claimant failed to provide respondent with timely notice of his work-related accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Timely notice is an issue specifically set forth in K.S.A. 1996 Supp. 44-534a that grants the Appeals Board jurisdiction to review a preliminary hearing order.

Claimant suffered a right inguinal hernia while performing heavy lifting work activities while employed by the respondent from June 28, 1996 through July 8, 1996. Claimant

testified and medical records admitted into evidence at the preliminary hearing established that claimant's right inguinal hernia was surgically repaired on August 14, 1996.

The Administrative Law Judge denied claimant's request for preliminary compensation benefits finding that claimant had failed to satisfy the workers compensation notice statute. K.S.A. 44-520 requires the employee to give the employer notice of a work-related accident within ten (10) days thereof, except actual knowledge of the accident by the employer or the employer's agent renders giving of notice unnecessary. Further, if the employee can show just cause for failure to give the ten day (10) notice of the accident, the employee has seventy-five (75) days from date of accident to give the employer notice.

The claimant argues that he satisfied the requirements of the notice statute by notifying management representatives of the respondent, Marcia Lovely, Bernice St. Clair, and Candace Beck, that he had pain in his abdominal and groin areas while he was working for the respondent. Claimant alleges that this information communicated to those managers provided the respondent with actual knowledge that he suffered a work-related accident while employed by the respondent. Additionally, claimant alleges that because of the heavy lifting activities he had to perform, a reasonable conscientious supervisor would have ascertained that claimant's injury was work-related after the employee notified the supervisor he had pain in his abdomen and groin.

The claimant and his immediate supervisor, Marcia Lovely, both testified in person before the Administrative Law Judge at the preliminary hearing. Ms. Lovely contradicted claimant's testimony by testifying claimant had not complained at any time while he was under her supervision that he had any pain. Furthermore, Ms. Lovely testified claimant had not complained to her that he was having any physical problems performing his work. Ms. Lovely testified that she had observed the claimant working and there had been no indication that claimant was having any physical problems in the performance of his job duties. Ms. Lovely did testify that in the past she had given employees Excedrin for headaches and could have given the claimant Excedrin for a headache. However, she testified she had not given the claimant Excedrin for complaints of pain in his abdomen and groin.

The respondent argued that the first notification it received from claimant that he suffered a work-related injury was in a demand letter sent by claimant's attorney dated October 2, 1996. The respondent contends that since claimant's last day worked was July 8, 1996, claimant's request for compensation benefits is barred because notice was given in excess of the seventy-five (75) days allowed by statute when just cause is shown.

The Appeals Board finds some deference should be given to the Administrative Law Judge as he was able to personally observe the demeanor of the witnesses who gave conflicting testimony and thus assess their credibility. Accordingly, giving some deference to the conclusions of the Administrative Law Judge, the Appeals Board finds that the claimant failed to establish that the respondent had actual knowledge of his work-related accident. The Appeals Board further finds the claimant did give the respondent notice of

the accident but such notice exceeded the seventy-five (75) days allowed by statute to show just cause.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation of Administrative Law Judge Bryce D. Benedict dated December 2, 1996, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Matthew Queen, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director